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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 234.

THE UNITED STATES OF AMERICA *Ex Rel*, CHICAGO GREAT WESTERN RAILROAD COMPANY, and THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,
Respondents.

BRIEF FOR PETITIONERS.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,
Respondents.

BRIEF FOR PETITIONERS.

MAY IT PLEASE THE COURT:

This case comes to this Court on a writ of certiorari directed to the United States Court of Appeals for the District of Columbia, that Court having affirmed the action of the Supreme Court of the District of Columbia dismissing the petition of petitioners. The action is one by petitioners for a writ of mandamus to compel the Interstate Commerce

Commission (hereinafter called the "Commission") to take jurisdiction of issues raised by intervening petitions filed by petitioners in a case then pending before the Commission and known as its Docket No. 15682, *Missouri-Kansas-Texas Railroad Company* v. *Kansas City Terminal Railway Company,* and to determine the rights of petitioners. The Commission had dismissed petitioners' intervening petitions on the ground, so petitioners claim, that it had no jurisdiction to grant the relief requested or to determine the rights of petitioners asserted in those intervening petitioners. The Commission was the only respondent named by petitioners in their petition filed in the trial court. After the institution of the case, the Kansas City Terminal Railway Company (hereinafter called the "Terminal Company") and the Atchison, Topeka and Santa Fe Railway Company, Chicago, Rock Island and Pacific Railway Company, Union Pacific Railroad Company, Chicago, Burlington & Quincy Railroad Company and Missouri Pacific Railroad Company were permitted to intervene as respondents.

1. Reference to official report of opinions of lower courts and to reports and orders of the Commission.

This action was started in the Supreme Court of the District of Columbia. In dismissing petitioners' petition, the Supreme Court of the District wrote no opinion, and there is no official report of its decision. The opinion of the United States Court of Appeals for the District of Columbia is officially reported at 71 Fed. Second Series, 336, and appears in the printed record at pages 199 to 211, inclusive. The report of the Commission, as a result of which the action was instituted, is reported at 104 I. C. C. 203, and was accompanied by an order, not officially reported, which dismissed the intervening petitions filed by petitioners with the Commission. The report of the Commission ap-

pears at pages 69 to 119, inclusive, of the printed record, and the order dismissing petitioners' intervening petitions appears at page 119 of the printed record.

2. Statement of the case.

The facts out of which this controversy arises are undisputed and are fully set out in a report of the Commission (R. 69, *et seq.*) and in the opinion of the Court of Appeals (R. 199, *et seq.*). These facts may be briefly stated:

The Terminal Company is a Missouri corporation which was organized in 1906, for the purpose of acquiring, constructing and operating a new union station and terminal facilities in Kansas City, Missouri, and Kansas City, Kansas, for the benefit of ten trunk line railroads entering the old union station in Kansas City. On June 12, 1909, an operating agreement (R. 14, *et seq.*) was entered into for a term of 200 years, under which agreement each of the ten companies agreed to use the facilities of the Terminal Company and to pay its share of the expenses of said Terminal Company, including taxes, and interest and principal on its bonds, when due, as well as the expenses of operating and maintaining the Terminal Company's facilities. (R. 20, *et seq.*)

It was further agreed that if any using company defaulted in making its payments, the other companies would pay their proportion of the amount in default (R. 21), and the method of apportioning among the using or proprietary companies the amounts to be paid by them was also fixed (R. 25, *et seq.*, 31, *et seq.*). The agreement further provided that the payment of its portion of the Terminal Company's expenses was a condition precedent to the right of any using or proprietary company to use the Terminal Company's facilities (R. 34, *et seq.*). Each of the ten trunk lines then owned one-tenth of the capital stock of the Terminal Company. On the same date (June 12, 1909) the same parties executed a stock trust agreement for the same

term of 200 years (R. 120, *et seq.*) in which agreement they agreed to carry out the terms and provisions of the operating agreement and pledged the stock of the Terminal Company held by them as security for such promise.

On January 12, 1910, petitioners became parties to the stock trust agreement and the operating agreement through the execution of a supplemental operating agreement (R. 47, *et seq.*) and a supplemental stock trust agreement (R. 137, *et seq.*). At the time of the proceedings before the Commission each of the proprietary companies owned $183,333.33 of stock in the Terminal Company, and there was no other stock outstanding. This condition still obtains.

In conformity with said agreements the Terminal Company issued and sold $50,000,000 of bonds secured by its properties then owned and thereafter acquired (R. 195), and then proceeded with the acquisition of the properties necessary for its purposes and the construction and reconstruction of the necessary facilities, which now comprise the new union station and large terminals used for both freight and passenger service. The new station was put in operation in November, 1914.

The operating and supplemental operating agreements require each proprietary company to pay one-twelfth of the taxes of the Terminal Company and one-twelfth of the interest and principal payments due upon its bonds. Under the same agreements, the operating and maintenance expenses of the Terminal Company are paid by the using or proprietary companies on a user basis. All of these amounts are paid to the Terminal Company as compensation for the use of its terminal facilities by each of the owning lines, since that is the only return the owning lines receive for their money. There is some distribution by the Terminal Company among the owning lines of amounts paid as rental by tenants of the union station (R. 60), but these amounts are inconsequential, as the terminal was con-

structed to furnish transportation facilities and not as a profit-making venture.

Some of the using or proprietary companies have always made much more use of the Terminal Company's facilities than do other companies. There are four so-called large users and eight so-called smaller users. Under the operating agreement, petitioners, which make very small use of the Terminal Company's facilities (2.61 per cent by the Chicago Great Western and 2.24 per cent by the Kansas City Southern, in 1932), each pay one-twelfth of the Terminal Company's interest and taxes, and their share, on a user basis, of the operating expenses of the Terminal Company; while the Atchison, Topeka and Santa Fe Railway Company, for example, made 26.06 per cent of the total use of said facilities in 1932, but still paid only one-twelfth of the taxes and interest charges of the Terminal Company. Exhibit 2 attached to the petition filed in the Supreme Court of the District (R. 60) shows the percentage of use by each using line in 1932, the amounts paid by each on account of interest and taxes of the Terminal Company under the operating agreement and what each line would have paid for interest and taxes on a user basis.

As a result of this distribution of these charges, the cost to appellants for their use of the Terminal Company's facilities for the year 1932, for example, included $190,836.96 paid by the Chicago Great Western and $190,816.99 paid by the Kansas City Southern on account of interest and taxes, while the amount paid by the Santa Fe on the same account was $195,303.56. Had these charges for interest and taxes been divided on a user basis, the Santa Fe would have paid $599,655.32, the Chicago Great Western $60,057.57, and the Kansas City Southern $51,543.67. In other words, in 1932, the division of interest and taxes under the operating agreement instead of on a user basis saved the Santa Fe $404,351.76, while the excess cost to the Chicago Great Western and Kansas City South-

ern under the operating agreement was $130,779.39 and $139,269.82, respectively.

Sometime prior to March 10, 1924, the property of the Missouri, Kansas and Texas Railway Company, one of the proprietary Companies of the Terminal Company, was sold at foreclosure sale to the Missouri-Kansas-Texas Railroad Company, and this latter company refused to adopt the operating agreement. Its refusal to so adopt the agreement was later upheld by the courts. See *Kansas City Terminal Railway Co.* v. *Central Union Trust Co.*, 294 Fed. 32, certiorari denied, 264 U. S. 588; *Kansas City Terminal Ry. Co.* v. *Central Union Trust Co.*, 271 U. S. 445. On March 10, 1924, the Missouri-Kansas-Texas Railroad Company filed with the Commission a petition asking for the entry of an order pursuant to the provisions of paragraph (4) of Section 3 of the Act to Regulate Commerce, according to it the right to use, upon equitable terms, designated portions of the passenger station and other terminal facilities of the Terminal Company. The principal ground of the application was that the terms of the operating agreement were unjust, inequitable and burdensome, because the companies using the Terminal Company's facilities were required to pay the Terminal Company's interest and taxes on a numerical basis.

All of the proprietary companies of the Terminal Company were permitted to file intervening petitions in the proceeding thus instituted. In those petitions, the Terminal Company and the larger users alleged that the Missouri-Kansas-Texas Railroad Company should not be permitted to use the Terminal Company's facilities except in conformity with the terms of the operating agreement, and the smaller users, including petitioners, alleged that if the Missouri-Kansas-Texas Company were permitted to use the Terminal Company's facilities on terms more favorable than their own, similar relief should be granted them; also that in any event the terms of the operating

agreement were inequitable, unjust, unreasonable, discriminatory and unlawful. They prayed that all the companies using the Terminal Company's facilities should be permitted and required to pay for such use upon a fair, just and equitable basis. The intervening petitions filed by petitioners were attached to the petition filed in the trial court as Exhibit 3 (R. 61, *et seq.*) and Exhibit 4 (R. 63, *et seq.*).

After hearings, the Commission issued a report on November 10, 1925 (104 I. C. C. Rep. 203; R. 69, *et seq.*), finding that the Missouri-Kansas-Texas Railroad Company should be permitted to use the facilities of the Terminal Company, but dismissing the intervening petitions of petitioners and the other small users on the ground, as petitioners claim, that it had no jurisdiction under the law to alter the obligations imposed by the operating agreement upon the users of the Terminal Company's facilities. Three members of the Commission dissented from the majority opinion insofar as it refused relief to the smaller users, and expressed the opinion that the charges made by the Terminal Company should be apportioned upon a user basis, or upon some basis more just and equitable than the numerical basis imposed by the operating agreement (R. 104, *et seq.*).

Because of certain questions still unsettled in the Missouri, Kansas and Texas Railway Company foreclosure proceeding, and possibly for other reasons, nothing further was done in the proceeding before the Commission until March, 1931, when the Missouri-Kansas-Texas Railroad Company filed an application for further hearing to determine the amount of compensation which it should pay for its use of the Terminal Company's facilities. In April and May, 1931, and before any hearing was had upon the last mentioned application, petitioners filed their petitions in said proceeding praying for a rehearing upon the order dismissing their intervening petitions. Those petitions for rehearing were denied on June 1, 1931.

Thereafter from time to time hearings were had on the application of the Missouri-Kansas-Texas Railroad Company, but the proceeding was still pending when petitioners, on May 31, 1933, filed their petition (R. 1, *et seq.*) in the Supreme Court of the District of Columbia, praying a writ of mandamus to compel the Commission to set aside its order of November 10, 1925, dismissing petitioners' intervening petitions and its order of June 1, 1931, denying their petitions for rehearing; and to compel the Commission to hear and decide the issues raised by said intervening petitions upon their merits.

On November 13, 1933, while the case was pending in the Court of Appeals, the Commission issued a report on the application of the Missouri-Kansas-Texas Railroad Company for an order fixing the compensation which it should pay for its use of the Terminal Company's facilities. This report appears at 198 I. C. C. 4. Subsequent to the issuance of that report and the entry of an order thereon, the Missouri-Kansas-Texas Railroad Company agreed with the lines owning the stock of the Terminal Company to execute supplemental operating and stock trust agreements, the effect of which would be to restore it as a proprietary line of the Terminal Company and entitle it to use the facilities of the Terminal Company subject to the original operating agreements.

Pursuant to this agreement, the Missouri-Kansas-Texas Railroad Company has filed with the Commission, in Finance Docket No. 10571, an application to continue using the facilities of the Terminal Company and for authority to assume the necessary obligations with respect to its securities; and has also filed in the original case, Docket 15682 an application for an order relieving it from compliance with the report and order made by the Commission therein on November 13, 1933. If these applications are granted, the Missouri-Kansas-Texas Railroad Company will stand in the same relation to the Terminal Company as its prede-

cessor in interest, petitioners, and the other proprietary lines.

3. Proceedings in the lower courts.

Petitioners' petition for mandamus was filed in the Supreme Court of the District of Columbia on May 31, 1933, and appears at pages 1, *et seq.*, of the printed record. That petition set out the proceedings theretofore had before the Commission and alleged that in its report and order of November 10, 1925, the Commission declined to exercise a jurisdiction conferred upon it by law and prayed for the issuance of a writ of mandamus to compel the Commission to set aside its order of November 10, 1925, dismissing petitioners' intervening petitions filed with it, and its order of June 1, 1931, denying petitioners' petitions for rehearing, and to compel the Commission to hear and decide the issues raised by those intervening petitions upon their merits. Attached to the petition as exhibits were copies of the agreements relating to the construction, maintenance and operation of the facilities of the Terminal Company (R. 14, *et seq.;* 120, *et seq.*), the report and order of the Commission made on November 10, 1925 (R. 69, *et seq.*), the intervening petitions filed with the Commission by petitioners (R. 61, *et seq.;* 63, *et seq.*) and a statement showing for the year 1932, the percentage of use made of the Terminal Company's facilities by each using line, the amount of taxes and interest charges of the Terminal Company paid by each using line, the amount which would have been paid by each using line on account of such taxes and interest charges had they been distributed on a user basis, and the increase or decrease in the amount paid which would have resulted had such taxes and interest charges been distributed on the user basis (R. 60).

On June 7, 1933, the Commission filed its answer (R. 157). On June 13, 1933, the Atchison, Topeka and Santa Fe Railway Company; Chicago, Rock Island and Pacific Railway Company; Union Pacific Railroad Company, and Chicago,

Burlington & Quincy Railroad Company were permitted to intervene as respondents (R. 165) and thereafter filed an answer (R. 165, *et seq.*). On June 22, 1933, the Terminal Company was permitted to intervene as a respondent (R. 183) and filed its answer the same day (R. 184, *et seq.*). On the hearing of the cause, the Missouri Pacific Railroad Company was permitted to intervene as a respondent and become a party to the intervening petition and answer theretofore filed by the Atchison, Topeka & Santa Fe Railway Company, *et al.* (R. 195). Under these answers and a stipulation made upon the hearing (R. 195) the essential allegations of fact contained in the petition were admitted. Those facts are as set out herein, in the report of the Commission, and in the decision of the Court of Appeals.

The cause came on for hearing in the Supreme Court of the District of Columbia on June 22, 1933, on a demurrer filed that day by petitioners to the answers theretofore filed by respondents (R. 193). The Court thereupon overruled the demurrer, and, petitioners electing to stand thereon, the Court entered an order on June 23, 1933, dismissing petitioners' petition for a writ of mandamus but allowing an appeal to the Court of Appeals (R. 194). The case was thereafter briefed and argued in the Court of Appeals, and on May 7, 1934, that Court handed down its decision (R. 199, *et seq.*) affirming the action of the Supreme Court of the District. While concurring in the judgment of the Court of Appeals, Mr. Justice Hitz dissented from the view of the majority of the court that the Commission did not have the power and jurisdiction claimed for it by petitioners (R. 210).

4. Proceedings in this Court.

On July 28, 1934, petitioners filed in this Court their petition for a writ of certiorari to the Court of Appeals of the District of Columbia, which petition was granted by an order entered by this Court on October 8, 1934 (R. 215).

SPECIFICATION OF ERRORS.

Petitioners make the following specification of errors:

(1) The Court of Appeals erred in holding that the Interstate Commerce Commission assumed and exercised jurisdiction in dealing with the questions presented to it by petitioners' intervening petitions, and in holding that the Interstate Commerce Commission did not, in dealing with those intervening petitions, base its decision upon a lack of jurisdiction to hear and decide the issues raised thereby. The Interstate Commerce Commission plainly refused to decide the issues presented by petitioners' intervening petitions, basing that refusal upon an alleged lack of power and jurisdiction, and the Court of Appeals erred in failing to so hold.

(2) The Court of Appeals erred in holding that because of the action taken by the Interstate Commerce Commission, the Court was thereby deprived of jurisdiction to grant the writ of mandamus prayed for by petitioners; and in holding that the action of the Interstate Commerce Commission was judicial, and that by reason thereof the Court could do nothing to correct the result produced by the Interstate Commerce Commission's action.

(3) The Court of Appeals erred in failing to hold that the Interstate Commerce Commission refused to exercise its jurisdiction to hear and decide the issues presented to it by petitioners' intervening petitions, and in failing to hold that such refusal could be controlled by mandamus in this case.

(4) The Court of Appeals erred in holding that the Interstate Commerce Commission did not have power and jurisdiction, upon a proper record, to grant the relief requested by petitioners in their intervening petitions presented to the Commission.

SUMMARY OF ARGUMENT.

(1) The question of whether or not the Commission exercised jurisdiction when it dismissed the intervening petitions filed with it by petitioners is one to be determined upon a consideration of the situation existing when the order of dismissal was made, the matters taken into consideration by the Commission before it entered its order and the language it used in stating the conclusions reached by it. A consideration of these matters compels the conclusion that in dismissing those intervening petitions the Commission denied its power and jurisdiction to consider on their merits the issues presented thereby and that in any case, it only took such jurisdiction as was necessary for it to decide that it did not have power and jurisdiction to decide the issues upon the merits.

(2) If the Commission had the power and jurisdiction claimed for it, its manifest duty was to determine the merits of the issues presented to it by petitioners' intervening petitions upon their merits. Instead of so doing, it held that it did not have the power and jurisdiction invoked. Under these circumstances mandamus was the proper method of enforcing petitioners' rights. Any denial by the Commission of a power vested in it by the Interstate Commerce Act is subject to correction through mandamus.

(3) The Commission had the power and jurisdiction to consider and determine the merits of the issues presented to it by the intervening petitions of petitioners for the following reasons:

(a) That power is specifically conferred upon the Commission by paragraphs 1 and 3 of Section 3 which prohibit every form of discrimination and prejudice and grant to the Commission power to deal therewith. One claim made to the Commission was that the situation existing under the operating agreement relating to the use of the facilities of the Terminal Company was that it was discriminatory against and prejudicial of the rights of petitioners.

(b) The Commission also had the suggested power under paragraph 4 of Section 3 of the Interstate Commerce Act since under that part of the law, the right to fix the fair compensation to be paid for the use of terminal facilities by a railroad not owning them is coordinate with and a part of the power to require such use.

(c) The Commission also had the suggested power under other sections of the Interstate Commerce Act. The existing situation demonstrates not only a prejudice and discrimination against petitioners, but the imposition upon it of undue burdens upon their interstate commerce. The prevention and removal of such burdens is one of the Commission's most important functions and jurisdiction to that end inheres in almost every section of the Act conferring power and authority upon the Commission.

(d) The character of relief sought by petitioners before the Commission confirms the suggested jurisdiction and power of the Commission, since the undisputed facts show that the payments which petitioners are now required to make for their use of the facilities of the Terminal Company constitute not only a prejudice of and discrimination against them but also an undue burden upon their interstate commerce.

(e) The existence of the operating agreement under which petitioners make the payments now required of them for their use of the facilities of the Terminal Company does not and cannot affect the power of the Commission to deal with such payments. No violation of the Interstate Commerce Act is rendered immune from the regulatory authority of the Commission merely because it results from the operation of a preexisting contract.

(f) The status of petitioners as stockholders of the Terminal Company does not and cannot limit the power of the Commission since all payments made by petitioners to the Terminal Company are paid as compensation for their use of the facilities of the Terminal Company, and not because of their status as stockholders of that company.

(g) The exercise of jurisdiction by the Commission will not adversely affect any public interest. The holders of securities issued by the Terminal Company are not and cannot be interested in the sources from which that company draws the revenue with which to meet its obligations. Petitioners have never asked for any order which would affect or impair in any way the obligations of the Terminal Company to the holders of its securities.

(4) Petitioners have not been guilty of such laches as would require a denial of the writ prayed for. The disposal of the case on the ground of laches would deny to petitioners that determination with respect to the Commission's jurisdiction to which they are entitled. In any case, any delay of which petitioners may have been guilty, has not damaged any party to the proceeding except themselves, and since there is involved a question of public interest, the defense of laches may not prevail.

(5) The case is not moot because of the entry of an order by the Commission in the proceeding pending before it upon the application of Missouri-Kansas-Texas Railroad Company. Petitioners are still entitled to a determination of the issues presented by their petitions filed with the Commission. Any order made by the Commission in the proceeding before it is not final in the sense that a court judgment is final and the case cannot, therefore, be said to be moot merely because the Commission has made an order with respect to one branch of the case pending before it.

ARGUMENT.

I.

The Court of Appeals erred in holding that the Commission had exercised jurisdiction when it dismissed the intervening petitions filed with it by petitioners.

In the Court of Appeals, petitioners necessarily claimed that the Commission had not exercised jurisdiction when it dismissed the intervening petitions filed with it by petitioners, but that on the contrary, such dismissal constituted a denial of jurisdiction. The Court of Appeals overruled this contention.

Whether or not it was right in thus construing what the Commission had done must be decided upon a consideration of the circumstances and what was said and done by the Commission. It is true, as stated by the lower court (R. 210), that the Commission held hearings and made a large record in the case pending before it prior to the issuance of its report of November 10, 1925, but that record was made to determine the issues raised by the petition of the Missouri-Kansas-Texas Railroad and not to determine the issues raised by petitioners.

At the time its report was made, the situation before the Commission, insofar as it related to petitioners' intervening petitions, was that those petitions had been filed with the Commission and the power of the Commission to grant the relief therein requested had been questioned in a motion to dismiss the petitions (R. 72). The specific issue which the Commission was called upon to decide, so far as petitioners' intervening petitions were concerned, was whether or not it had the power to do what was requested. Referring to that issue, the Commission said (R. 92):

> "Controverting respondents' challenge of our power or authority to grant any such relief, the interveners contend that we have power under existing law to relieve them of the obligations imposed by the operating agreement."

Speaking of the argument in support of the motion to dismiss, the Commission said (R. 93):

> "The counter contention, that what is asked is the reformation of a contract, involving a power vested exclusively in courts of equity and exercisable only in cases of fraud or mutual mistake, asserts a familiar principle of equity jurisprudence as applied to private contracts, of concern only to the parties thereto."

Summarizing the issue presented to it by the intervening petitions and the motion to dismiss, the Commission then said (R. 94):

> "Whether, then, Congress has or has not appropriately exerted its plenary power directly or through us is a question at the threshold of each case, and it remains here to consider whether the particular power invoked by the interveners has been conferred upon us."

After a discussion of its claimed power under paragraph (4) of Section 3 of the Act to Regulate Commerce, the Commission said (R. 95):

> "The power and authority thus invoked are not conferred by the quoted paragraph."

Discussing its power under Section 15a of the same Act, the Commission said (R. 96):

> "However desirable it might be in particular instances, we are unable to spell out from that provision such a jurisdiction. * * * Neither expressly nor by implication does the provision embrace a direct or indirect revision or reformation of any such contract, lawful in itself as far as appears, as that here in question; and we are unable to find the requisite power or authority in any other provision of the act."

After a discussion of paragraphs (1) and (3) of Section 3 of the same Act, the Commission said with respect to them (R. 96):

> "Assuming, without now deciding, that the provisions of paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation."

Then follows its conclusion, it being said (R. 97):

> "An order will be entered dismissing the intervening petitions of the Kansas City Southern, Frisco, Great Western, Wabash, Milwaukee tnd Alton."

Thus, it definitely appears that the issue raised by the motion to dismiss was one of the Commission's power and jurisdiction; that the question which the Commission decided was said by it to be one of its jurisdiction and power; and that the decision made by the Commission was made only after a consideration of its jurisdiction and power. In fact, referring to the power claimed for it by petitioners, the Commission said (R. 96):

> "We are unable to find the requested power or authority in any other provision of the Act."

The Court of Appeals found that the Commission had heard evidence and on the facts shown had reached the conclusion that the relief asked could not be granted (R. 210). We submit that this is not so. As we have said the hearings had and record made were necessary to a consideration of the issues raised by the Missouri-Kansas-Texas Railroad. None of those facts were discussed or weighed by the Commission in its consideration of the motion to dismiss petitioners' petitions. What the Court of Appeals held with respect to this point may best be shown by a reference to what is said in its opinion. In discussing what the Commission had done and referring to the statements made by the Commission, and which we have quoted, the Court said (R. 208):

> "It is not a lack of jurisdiction to hear and decide that the Commission refers to but a lack of legislative authority to do the particular thing appellants ask. The Commission is an administrative body and can exercise only the powers delegated to it by Congress, but in the application and interpretation of the powers conferred it exercises judgment and discretion, and it was clearly in the exercise of these that it used the language in the quoted sentences above. If the Commission has the power in this instance to change the contract, it got it only by statute, and it was by looking to the statute and its limitations that the Commission reached its negative conclusion."

Further dealing with the action actually taken by the Commission, the Court said (R. 209, 210):

> "If what the Commission had done was to refuse to hear the case made by petitioners, or, having heard it, refused to carry out the plain mandate of the statute, as was the case in *Roberts* v. *United States*, 176 U. S. 221, mandamus would be the proper remedy, but that is not this case, for the Commission did not refuse to hear and to decide; it did both, and an examination of the provisions relied on clearly may not be said by anyone, when considered in the light of appellants' claims, to discose a positive command. *Wilbur* v. *United States*, 281 U. S. 206, 218-19. The mistake appellants make is that they construe the refusal of the Commission to find in the act authority to do the thing appellants pray may be done, as denial of jurisdiction, whereas the fact is the Commission assumed jurisdiction, heard the evidence, and reached the conclusion that on the facts shown no relief could be given under the provisions of the applicable laws."

We submit that the conclusion reached by the Court of Appeals was plainly wrong in view of what the Commission actually said and did, and that an analysis of the Court's opinion so shows. The statement that the Commission, in using the language it did, found that it had no legislative authority to do what petitioners asked, instead of holding

that it had no jurisdiction to hear and and decide, seems to us to be inconsistent. A lack of power to order the discontinuance of a law violation would seem to be equivalent to a lack of power to hear evidence and decide whether the violation did or did not exist. If this is not so, there might be an ascertained case of law violation, with no power in the Commission to order its discontinuance. It follows that if the Commission actually held that it had no authority to do what petitioners asked, as the Court of Appeals says it held, that holding amounted to a decision that it did not have the necessary power and jurisdiction. One holding would be the same as the other, but in different words.

Again, the statement of the Court of Appeals (R. 208) that if the Commission had the power claimed for it, it got it only from statute and that it was by looking to the statute and its limitations that the Commission reached the conclusion it did, seems to us to be equivalent to a statement that the Commission, upon a consideration of the law, concluded that it did not have the power and jurisdiction claimed for it. It follows that if the Commission exercised judgment, as stated by the Court of Appeals, it only exercised that judgment to determine that it did not have power and jurisdiction under the law to decide upon their merits the issues raised by petitioners.

Again, we submit that the statement of the Court of Appeals that the Commission assumed jurisdiction but concluded that no relief could be granted petitioners under the applicable law, amounts to a statement that the Commission took jurisdiction in order to determine whether or not it had jurisdiction to deal with the merits of the issues presented, and after a consideration of the law, decided that it did not have the necessary power. We submit that the taking of jurisdiction by the Commission, for the purpose of holding that it did not have power to deal with the issues on their merits, is not an action by the Commission which is impregnable to mandamus.

In every case where there is a denial of jurisdiction, as there was here, there must necessarily be some hearing by a court or commission to determine the question, and such a hearing does not constitute the taking of jurisdiction. Thus, in *Interstate Commerce Commission* v. *Humboldt Steamship Company*, 224 U. S. 474, this Court, in referring to the powers and duties of the Commission, said at page 484:

> "It may exercise judgment and discretion, and it may be cannot be controlled in either. But if it absolutely refuse to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion."

In this case we submit that it is clear the Commission denied its power from what petitioners assert was a misunderstanding of the law, and upon analysis of its opinion, it would seem this was the view held by the Court of Appeals. If so, the conclusion of that Court that the action of the Commission could not be corrected through mandamus was certainly wrong.

That the Commission did deny its jurisdiction to grant the relief requested by petitioners is conceded in the answers filed by all the intervening respondents. Only in the answer of the Commission is there any statement that this is not so.

In that document it is said (R. 162) that the Commission did consider and determine upon the merits the asserted violations of paragraphs (1) and (3) of the Interstate Commerce Act and found that no such violations had been shown or established. This claim must be based upon that discussion of those paragraphs where the Commission said (R. 96):

> "Assuming, without now deciding, that the provisions of paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered

and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation."

Certainly, this language does not constitute a decision on the merits. The words used negative such a conclusion, for they constitute a statement by the Commission that it did not decide it had the power claimed for it. Any claim that the language demonstrates a taking of jurisdiction cannot be reconciled with the Commission's previous statements that it was considering only the question of its power (R. 94), and that it was unable to find in any provision of the Act the requisite power and authority to deal with the issues presented by petitioners' intervening petitions (R. 96).

We submit that under the foregoing, there is no support for the conclusion that the Commission exercised any jurisdiction whatsoever in dismissing petitioners' intervening petitions. Every circumstance compels the conclusion that what the Commission did in sustaining the motion to dismiss petitioners' intervening petitions was to hold that it had no power or jurisdiction to grant the relief requested by petitioners; all without regard to whether or not the facts justified the granting of such relief.

II.

If the Commission had the power and jurisdiction claimed for it, its duty was to investigate and determine the merits of the issues presented to it by petitioners' intervening petitions. Since it declined to do so, mandamus is the proper remedy to enforce petitioners' rights. The Court of Appeals erred in failing to so hold.

Argument in support of this proposition is presented on the assumption of the Commission's jurisdiction, the existence of which we shall hereafter demonstrate. As we have shown, the Commission actually did deny its power,

but if it had the power claimed for it, its duty in the premises was clear.

Petitioners and the intervening respondents are all common carriers subject to the Interstate Commerce Act. Paragraphs (1) and (3) of Section 3 of that act (U. S. C. A., Title 49, pp. 158, 195) are specific in declaring unlawful the preference, advantage and discrimination referred to therein, and in prohibiting the same.

Paragraph (4) of Section 3 (U. S. C. A., Title 49, p. 201) is definite in conferring upon the Commission power to fix the terms and conditions under which one carrier may use the terminal facilities of other carriers. Paragraph (1) of Section 12 (U. S. C. A., Title 49, p. 368) authorizes and directs the Commission to execute and enforce the provisions of the Act. Paragraph (1) of Section 13 (U. S. C. A., Title 49, p. 377) authorizes the filing with the Commission by any common carrier of a petition complaining of anything done or omitted to be done by any common carrier subject to the provisions of the Act, in contravention of the provisions thereof and concludes as follows:

> "If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

And in conclusion, paragraph (1) of Section 14 (U. S. C. A., Title 49, p. 394) imposes upon the Commission the duty, after investigation, of making a report in writing with respect thereto, which report shall state its conclusions and its decision in the premises.

In view of the foregoing, it may not be denied that if it had the power claimed, the duty of the Commission in this case was mandatory. It had no alternative other than to receive the intervening petitions of petitioners, investigate and consider the matters therein set out, and decide

such matters upon the merits as developed by the evidence. Instead of doing this, the Commission dismissed the petitions upon a finding that it did not have jurisdiction to deal with them as the law would have otherwise required it to deal.

Under these circumstances, mandamus is unquestionably the proper remedy, and indeed, it is the only remedy available to petitioners. That this is so is now definitely settled by the decisions of this Court in *Interstate Commerce Commission* v. *Humboldt Steamship Company,* 224 U. S. 474, 484, 485; *Louisville Cement Co.* v. *Interstate Commerce Commission,* 246 U. S. 638, 642, 643; *Kansas City Southern Railway* v. *Interstate Commerce Commission,* 252 U. S. 178, 187; and *Interstate Commerce Commission* v. *Los Angeles,* 280 U. S. 52. The same rule has been applied in the Court of Appeals for the District of Columbia. *Blair* v. *United States, ex rel. Union Pacific R. Co.,* 6 Fed. (2d) 484, 486; *United States* v. *Board of Tax Appeals,* 16 Fed. (2d) 337, 339; *United States* v. *Interstate Commerce Commission,* 34 Fed. (2d) 228.

The rule is stated in the *Louisville Cement Company Case, supra,* in which this Court said at pages 642 and 643:

> "That the Supreme Court of the District of Columbia, in a proper case, has power to direct the Commission by mandamus to entertain and proceed to adjudicate a cause which it has erroneously declared to be not within its jurisdiction is decided in *Interstate Commerce Commission* v. *Humboldt Steamship Co.,* 224 U. S. 474. If the Commission did so err, on the authority of many decisions, among them *Ex parte Russell,* 13 Wall. 644; *Ex parte Schollenberger,* 96 U. S. 369; *Hollon Parker, Petitioner,* 131 U. S. 221; *In re Grossmayer,* 177 U. S. 48, and *Interstate Commerce Commission* v. *Humboldt Steamship Co.,* 224 U. S. 474, 485, the courts may correct such error on a petition for mandamus, where, as in this case, the erroneous decision cannot be reviewed on appeal or writ of error."

We are aware of those cases in which it has been held that mandamus cannot be had to require a particular exercise of judgment or discretion, jurisdiction having been assumed and a decision on the merits having been made. *Interstate Commerce Commission* v. *Campbell,* 289 U. S. 385; *Work* v. *Rives,* 267 U. S. 175; *United States* v. *Interstate Commerce Commission,* 8 Fed. (2d) 901, 902; *United States* v. *Interstate Commerce Commission,* 11 Fed. (2d) 554, 556; *Bartlesville Zinc Co.* v. *Interstate Commerce Commission,* 30 Fed. (2d) 479, 480; *United States* v. *Mellon,* 41 Fed. (2d) 119, 120; *Southern Transportation Company* v. *Commission,* 47 Fed. (2d) 411, 413; *United States* v. *Interstate Commerce Commission,* 51 Fed. (2d) 429, 431; *Southern Transportation Co.* v. *Interstate Commerce Commission,* 61 Fed. (2d) 925.

In this case, however, there has been no decision on the merits of petitioners' claims. Nor do petitioners ask this Court to direct the Commission to decide the issues presented to it in any particular way. All they request is an order requiring the Commission to consider those issues on their merits and decide them in some way. Even in the cases last cited, however, it has been uniformly held that mandamus will issue to compel a performance of duty. Thus, in *Interstate Commerce Commission* v. *Campbell,* 289 U. S. 385, this Court said at page 394:

> "If the Commission had declined to listen to the claim for reparation, or finding reparation due had declined to order payment, mandamus might have been available to hold it to its duty * * *. Mandamus is an appropriate remedy to compel a judicial officer to act."

In its opinion, the Court of Appeals did not hold that the rule of law was otherwise, but avoided the effect of the rule by a holding that the Commission had exercised its judgment and discretion in such a way as to make the rule inapplicable. The Court did not go so far as to say that

the Commission had determined the merits of petitioners' claims. On the contrary, it said that the judgment exercised by the Commission led it to conclude that it had no "legislative authority" to do what petitioners asked (R. 208); that by "looking to the statute and its limitations" the Commission decided it had no power to change the contract (R. 208).

Again, after some discussion of the Commission's power in the premises, the Court further said (R. 209):

> "But even if we think the statute may be so construed, it does not follow that this court or any other court can require the Commission to decide the question in that way when it has considered the matter and announced that its own judgment is opposed to that interpretation. In that case, its interpretation, right or wrong, is the exercise of judgment and discretion—impregnable to mandamus."

It seems to us that the foregoing statements mean only that the Commission, after a consideration of the law, concluded that it did not have power to deal with the merits of the issues presented by petitioners, and that its decision cannot be corrected by mandamus. We submit that in so holding, the lower court was clearly wrong.

In the *Humboldt Steamship Company Case,* 224 U. S. 474, the Commission received a petition and then held that the statute under which relief was claimed did not authorize it to exercise jurisdiction. But this Court held that a writ should issue to compel the Commission to exercise its jurisdiction, saying (p. 484) that a denial of power was not an exercise of jurisdiction. In the *Louisville Cement Company Case,* 246 U. S. 638, the Commission took jurisdiction of a claim for reparation and held that the rates assailed were unreasonable, but declined to grant full reparation because of the construction placed by it upon the law. In both of these cases, the Commission decided that it did not have the "legislative authority" and "requisite power" to grant the relief requested; yet mandamus was granted. It would

seem that in this case, where the Commission did precisely the same thing, according to the Court of Appeals, the same result should follow.

Reference is made by the lower court (R. 210) to *Wilbur* v. *United States,* 281 U. S. 206, but we submit that the case is not in point. The situation there was that the Secretary of the Interior had exercised a discretion, conferred upon him by statute, in determining who should be enrolled as members of an Indian tribe. The granting of the writ would have constituted the Court as the judge of who should be enrolled, and would have required the Secretary to exercise his discretion in a certain way in order to produce a result thought by the Court to be proper.

That is not the situation in the case at bar, for petitioners do not ask that the Commission be required to exercise its discretion in any certain way. They only ask for a hearing and a decision on the merits of the issues presented by them to the Commission. Other cases similar to the *Wilbur Case, supra,* are *Ness* v. *Fisher,* 223 U. S. 683, 691; *Alaska Smokeless Coal Co.* v. *Lane,* 250 U. S. 549, 555; *United States* v. *Wilber,* 283 U. S. 414; *Interstate Commerce Commission* v. *N. Y., N. H. & H. Ry. Co.,* 287 U. S. 178, and *B. A. & P. Ry. Co.* v. *United States,* 290 U. S. 127, 142. In all these cases, mandamus was refused because there had been an exercise of jurisdiction. In the *Campbell Case,* 289 U. S. 385, cited in the opinion of the lower court (R. 210), the action of the Commission complained of was its finding that it could not award damages because of insufficient proof. None of these cases are in point. The test to apply here is the test laid down by this Court in the *Campbell Case, supra,* at page 394, where it was said:

> "If the mandamus were to stand, the result would not be to compel the Commission to adjudicate the cause, for that it has already done; the result would be to compel adjudication in a particular way."

If a writ of mandamus were to issue in ths case, it would only require the Commission to adjudicate the merits of the issues presented in petitioners' intervening petitions. The Commission, however, would still be free to determine the merits of the cause in any way it thought proper.

The decision of the lower court confers immunity upon the Commission's decision, although it is apparently held that the Commission only went so far as to conclude that it had no power to deal with the merits of the issues presented. We submit that this holding was erroneous; that the case at bar is controlled by the decisions of this Court in the *Humboldt Steamship Company Case, supra,* and the *Louisville Cement Company Case, supra;* and that if the Commission actually had the power and jurisdiction claimed for it, its action in denying that jurisdiction is not impregnable to mandamus.

III.

The Commission had power and jurisdiction to consider and determine upon the merits the issues presented to it by the intervening petitions of petitioners.

The intervening petitions filed with the Commission by petitioners (R. 61, *et seq.;* 63, *et seq.*) alleged in substance that the division of the taxes and interest charges of the Terminal Company upon the numerical basis, as provided by the operating agreement, was unjust, inequitable, prejudicial, discriminatory and contrary to public interest, in violation of the Interstate Commerce Act. The granting of relief to petitioners would have required an entry of an order by the Commission fixing a basis for the payment of such compensation, as between the using carriers, different from the basis prescribed by the operating agreement, and the Commission held it had no power or authority to make such an order. The same conclusion was reached by the Court of Appeals, for that Court, after a statement of the powers of the Commission, said (R. 208):

> "but it is going too far to say that all or any of these powers of themselves justify the abrogation or annulment of a valid contract between carriers in the use of terminal facilities because in its subsequent carrying out inequalities are shown to exist."

Mr. Justice Hitz dissented from this conclusion of the Court of Appeals, saying (R. 211):

> "I feel constrained to dissent from the view * * * that a common carrier subject to the provisions of these statutes may contract itself out of the power of the Commission by an arrangement involving so much of its revenue and covering so long a time as to impair or destroy its power to perform its public obligations."

Petitioners assert in this Court that the Commission did and does have jurisdiction, upon a proper record, to make an order granting the relief requested. Several matters are pertinent to a consideration of the Commission's power and in order that this Court may have a clear understanding of our position on the subject, we shall deal with these matters in order.

1. PARAGRAPHS (1) AND (3) OF SECTION 3 OF THE INTERSTATE COMMERCE ACT CONFER UPON THE COMMISSION POWER AND JURISDICTION TO CONSIDER THE MERITS OF THE ISSUES PRESENTED BY PETITIONERS IN THEIR INTERVENING PETITIONS, AND REACH A DECISION WITH RESPECT THERETO.

The matter of the Commission's jurisdiction in this case is dealt with rather fully in the dissenting opinion written by Commissioner Eastman (R. 104, *et seq.*). That jurisdiction seems to us to be plain from a consideration of the law itself and the decisions of this Court construing it. Paragraph (1) of Section 3 of the Interstate Commerce Act (U. S. C. A., Title 49, p. 158) reads as follows:

> "*Undue preference or prejudice prohibited.* It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or

> unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject and particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in ay respect whatsoever."

Paragraph (3) of Section 3 (U. S. C. A., Title 49, p. 195) reads as follows:

> "*Interchange of traffic.* All carriers, engaged in the transportation of passengers or property, subject to the provisions of this chapter, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper."

These sections of the Act may be considered together. Their purpose was to destroy favoritism, prohibit preferences and eliminate every form of discrimination and inequality. *N. Y., N. H. & H. R.R. Co.* v. *Interstate Commerce Commission,* 200 U. S. 361; *Bitterman* v. *Louisville & Nashville R. Co.,* 207 U. S. 205; *Louisville & Nashville R. Co.* v. *Mottley,* 219 U. S. 467; *Central Railroad Company of New Jersey* v. *United States,* 257 U. S. 247; *Tap Line Cases,* 234 U. S. 1.

In the last case above cited this Court said (p. 29) that the Commission "has the authority and it is its duty to reach all unlawful discriminatory practices resulting in favoritism and unfair advantage to particular carriers and shippers." It is thus plain that the prohibition of the act

against discrimination, preferences and inequalities operates in favor of carriers as well as shippers.

In other cases the holdings have been still more specific in condemning prejudice and discrimination against carriers. Thus, in *Pennsylvania Company* v. *United States,* 236 U. S. 351, the facts were that the Pennsylvania Company was performing service upon its terminals at New Castle, Pennsylvania, for certain carriers, but declined to do so for the Buffalo, Rochester & Pittsburgh Railway Company, the complainant before the Commission. The order of the Commission required the removal of the discrimination. Quoting paragraphs (1) and (3) of Section 3 of the Interstate Commerce Act as they then stood, this Court said at page 361:

> "This section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation, or locality; what is such undue or unreasonable preference or advantage is a question not of law, but of fact. *Texas & Pacific R. Co.* v. *Interstate Commerce Commission,* 162 U. S. 197, 219; *Interstate Commerce Commission* v. *Alabama Midland R. Co.,* 168 U. S. 144, 170."

In accordance with this construction of the law, this Court upheld the Commission's conclusion that there had been a discrimination against the Buffalo, Rochester & Pittsburgh Railway Company. In the case cited, the principal attack upon the order of the Commission was based upon the argument that the order required the Pennsylvania Company to give up the use of its terminals to another company, Section 3 of the act then prohibiting such a requirement. The section has since been amended so that this prohibition is no longer in the act, paragraph (4) of Section 3 conferring upon the Commission specific power to require the giving of such use.

In *Louisville & Nashville R. Co.* v. *United States,* 238 U. S. 1, a similar order by the Commission finding discrim-

ination as between common carriers in the use of terminals and requiring its removal was again upheld, this Court saying at page 20:

> "In this case the controlling feature of the Commission's order is the prohibition against discrimination."

In *Baltimore & Ohio Railroad Company* v. *United States,* 264 U. S. 258, the action was by twelve eastern railroads to set aside an order of the Commission permitting the New York Central to acquire control of terminal facilities operated by the Chicago River & Indiana Railroad Company and the Chicago Junction Railroad Company in Chicago. In sustaining the right of the plaintiffs to maintain the action and in dealing with possible loss which might be inflicted upon them as a result of the acquisition, this Court said at page 267:

> "It is injury inflicted by denying to the plaintiffs equality of treatment. To such treatment carriers are, under the Interstate Commerce Act, as fully entitled as any shipper. *Pennsylvania Co.* v. *United States,* 236 U. S. 351."

In *Chicago, Indianapolis & Louisville Railway Company* v. *United States,* 270 U. S. 287, the action was to set aside an order of the Commission finding discrimination against the Chicago, Lake Shore & South Bend Railway Company, in connection with terminal service furnished at South Bend, Indiana. In that case no argument was made that the Commission did not have power to order the discrimination and preference removed if they were found to exist in fact. Having found that the evidence justified the order, this Court sustained it.

It has been argued that paragraph (1) of Section 3 of the Act only covers the relations between carriers and shippers, but the words of the paragraph do not support the claim. The paragraph prohibits any common carrier giving any undue preference or advantage to any corpora-

tion. The Terminal Company is a common carrier subject to the Act and petitioners are certainly corporations. With respect to paragraph (3) of Section 3 it has only been said that the power claimed for the Commission has not been specifically conferred, and is so far-reaching in its nature that it cannot be inferred. This paragraph has not been changed since its enactment. It definitely prohibits a discrimination in rates, fares and charges as between common carriers subject to the Act. Petitioners alleged such a discrimination in their intervening petitions filed with the Commission and thus evoked a jurisdiction as old as the Act itself.

No one could contend that if the discrimination and prejudice alleged existed in fact the Commission would not have power to prohibit it. That power has been exercised so many times that it must now be beyond dispute. Thus, there would be nothing new or startling in the exercise of jurisdiction as requested by petitioners. The purpose of the Interstate Commerce Act, as announced in the decisions of this Court, was to eliminate every form of discrimination, preference and inequality. There is no exception of discrimination and inequality resulting from the operation of contracts for the use of terminal facilities. As stated by this Court in the *Transit Commission v. United States*, 289 U. S. 121, 125, the Commission has declared that,

> "the reasonableness of a joint facility rental is a matter of public interest, as well as one affecting the operations of the carriers."

A denial of the Commission's jurisdiction in this case under paragraphs (1) and (3) of Section 3 of the Act creates an exception not contained in the statute and limits the application of the law to a field much narrower than this Court has said it occupies.

2. UNDER PARAGRAPH (4) OF SECTION 3 OF THE INTERSTATE COMMERCE ACT THE COMMISSION ALSO HAS THE POWER AND JURISDICTION CLAIMED FOR IT.

The jurisdiction claimed for the Commission by petitioners also appears to be definitely granted by the language of paragraph (4) of Section 3 of the Interstate Commerce Act (U. S. C. A. Title 49, p. 201). That paragraph, insofar as it is pertinent, read as follows:

> "If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings."

The paragraph was added to the Interstate Commerce Act by the Transportation Act, 1920. With respect to its jurisdiction thereunder, the Commission said (R. 94):

> "The primary power to be exercised is to 'require the use' of the terminals, which power the further power to fix the compensation in appropriate circumstances merely supplements. The requirement is to be laid upon a carrier then 'owning or entitled to the emjoyment' of the facilities and for the benefit of 'another carrier' or 'other carriers'; in other words, to be laid upon a carrier owning or by lease or otherwise entitled to present enjoyment and for the benefit of a carrier or carriers not so owning or entitled.
>
> "Obviously, the interveners are not in the latter situation."

Applying this theory, the Commission then held that because petitioners had a right to use the facilities of the Terminal Company, provided they made the payments required by the operating agreement, it could do nothing in the way of affording them any relief, even though the facts might justify it. We submit that this was wrong.

Under paragraph (4) of Section 3 the Commission is given two powers: (1) to compel a carrier owning terminal facilities to permit another carrier to use those facilities; (2) to fix the terms for such use. The courts have held that the powers of the Commission are to be broadly construed to enable carriers to operate efficiently and economically. In such circumstances it is not reasonable to assume that the power to compel the use of terminal facilities and the power to fix the compensation to be paid therefor are to be narrowly construed, or that the Commission can act only in cases where it must exercise both powers. To so construe the law largely limits its application and the power of the Commission thereunder, which would be distinctly not in harmony with the purposes sought to be accomplished by its enactment as those purposes are announced in the cases we have cited.

Thus, the granting of a right to use by the Commission under this section of the Act would be worthless if a carrier owning terminals had the right to charge such a high rental for the use of its facilities as to prohibit the use. Conversely, the fixing by the Commission of reasonable compensation would be useless unless it also granted a right to use. Thus, it is obvious that the granting of a right to use and the fixing of reasonable compensation for such use are of equal importance.

The law itself makes no distinction between the two functions and does not confine the right to fix compensation to those cases in which a right to use is also granted. In the case at bar, for example, the right to use granted petitioners by the operating agreement is of little value because of the

excessive compensation which they are required to pay therefor.

And the Commission's jurisdiction under this paragraph is clear, even on its own theory. If, upon a consideration of the facts, it should hold that the user basis of dividing all expenses of the Terminal Company was proper, its order would necessarily require and grant the use of the Terminal Company's facilities by the using lines upon the making of payments as between the interested carriers on the basis approved by it. Thus the order would not only fix compensation for use, but also grant the right to use, subject to the payment of such compensation.

In other cases the Commission itself has adopted the theory for which we here contend. Thus, in *C. & A. R. Co.* v. *T. P. & W. R. Co.*, 146 I. C. C. 171, the Commission recognized the right of a railroad to come to it under paragraph (4) of Section 3 for the ascertainment and fixation of compensation to be paid for the use of terminal facilities, even though the right to use was conceded and offered by the carrier owning the facilities. In that case the right to use was offered upon the payment of a rental of $50,000 a year, just as in this case the right to use the facilities of the Terminal Company is granted to petitioners upon their agreement to each pay one-twelfth of the interest and taxes of the Terminal Company, together with other charges.

In the case cited, the complaining road felt that the compensation required to be paid for the use offered was excessive, just as petitioners feel that the compensation required at Kansas City under the operating agreement is excessive. And in the case cited the Commission upheld its jurisdiction, even though the only real issue between the parties involved was as to the amount to be paid for the use. The amount to be paid for the use of terminal facilities was also the only real issue in the *Transit Commission Case*, 289 U. S. 121.

With respect to paragraph (4) of Section 3 of the Act it has been argued that the paragraph only confers rights

upon a carrier not entitled to use terminal facilities. A use of terminal property, however, by a railroad other than the owner may be involuntary because of a claimed insufficiency of payment. Thus, in the case at bar, the Terminal Company was always willing to permit the use of its facilities by the Missouri-Kansas-Texas Railroad if it received the compensation required by the operating agreement. The only real issue between those carriers was that of compensation. The compulsion which it is claimed is necessary under paragraph (4) of Section 3 may well be a compulsion with respect to compensation as well as with respect to physical use.

3. THE COMMISSION ALSO HAD THE SUGGESTED POWER UNDER OTHER SECTIONS OF THE INTERSTATE COMMERCE ACT. THE REMOVAL OF UNDUE BURDENS ON THE INTERSTATE COMMERCE OF RAILROADS IS ONE OF THE COMMISSION'S MOST IMPORTANT FUNCTIONS AND JURISDICTION TO THAT END INHERES IN ALMOST EVERY SECTION OF THE ACT CONFERRING POWER AND AUTHORITY UPON THE COMMISSION.

On many occasions this Court has dealt with the general power of the Commission and has held that it has not only those powers expressly delegated by the Interstate Commerce Act, but also those which are necessary to make the Act effective and produce the results sought to be produced by the Congress.

In *Smith* v. *Interstate Commerce Commission,* 245 U. S. 33, this Court had occasion to deal with the general powers of the Commission under Sections 12 and 13 of the Act. It was said at pages 42 and 43:

> "And it would seem to be a necessary deduction from the cases that the investigating and supervising powers of the Commission extend to all of the activities of carriers and to all sums expended by them which could affect in any way their benefit or burden as agents of the public. * * * Turning to the specialties of the Interstate Commerce Act, we find there that all charges

and treatment of all passengers and property shall be just and reasonable, and there is a specific prohibition of preferences and discriminations in all the ways that they can be executed, with corresponding regulatory power in the Commission."

Thus, even prior to the enactment of the Transportation Act, 1920, the power of the Commission to deal with and prohibit all forms of discrimination and prejudice was recognized. Since the enactment of the Transportation Act, 1920 (U. S. C. A., Title 49, p.....), that power of the Commission has been greatly enlarged. This Court has had occasion to pass on the enlarged powers of the Commission in many cases, such as *Railroad Commission of Wisconsin, et al.*, v. *C. B. & Q. R. Co.*, 257 U. S. 563; *A. C. & Y. Ry. Co., et al.*, v. *United States*, 261 U. S. 184; *Dayton-Goose Creek Railway Company* v. *United States*, 263 U. S. 456; *Railroad Commission of California* v. *Southern Pacific Co., et al.*, 264 U. S. 331; *Colorado* v. *United States*, 271 U. S. 153, and *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24, 25.

In the *Wisconsin Case*, 257 U. S. 563, this Court said (p. 585) that the amendments added to the Act in 1920 made a new departure in that, as amended, the Act required the Commission to take the necessary steps to maintain an adequate railway service for the people of the United States. In the *Akron, Canton & Youngstown Railway Company Case*, 261 U. S. 184, it was said (p. 189) that the 1920 amendments introduced into federal legislation a new railroad policy; that it sought to insure adequate transportation service, and that this purpose was expressed in unequivocable language. In the *Dayton-Goose Creek Railway Company Case*, 263 U. S. 456, this Court said, at page 478:

"The new Act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic in the country. * * * To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering

guardianship and control of the Commission which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged. * * * To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety."

In *Railroad Commission* v. *Southern Pacific R. Co.*, 264 U. S. 331, the question presented involved the power of the Commission to pass upon the expenditure of a large amount of money by the railroads in the construction of a new union station. Sustaining the power of the Commission, this Court said (p. 347):

"The purpose of Congress to prevent interstate carriers from incurring expenses which will lessen their ability to perform well their interstate functions, is further shown in Section 439 of the Transportation Act, whereby the Interstate Commerce Act is amended by insertion of Section 20a."

In *Colorado* v. *United States,* 271 U. S. 153, the action was by the State of Colorado to set aside an order of the Commission made under paragraph (19) of Section 1 of the Act, authorizing the discontinuance of operation upon a line of railroad wholly within the State of Colorado. The order was based upon a finding by the Commission of discrimination against and prejudice of interstate commerce. In affirming the order this Court said at page 163:

"Prejudice to interstate commerce may be affected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local inter-

> est may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken the financial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates. Such depletion of the common resources in the local interest may conceivably be effected by continued operation of an intrastate branch in intrastate commerce at a large loss."

We call attention to the foregoing quotation, for the prejudice there stated by the Court as being possible is precisely the sort of prejudice and discrimination which petitioners claim exists at Kansas City.

The holding in the *Colorado Case, supra,* has been recently upheld by this Court in *Texas* v. *United States,* 292 U. S. 522. There the issue was the power of the Commission under Section 5 of the Act as amended by the Emergency Transportation Act, 1933, to approve a lease under which the Kansas City Southern Railway, a petitioner in the case at bar, was to acquire the properties of the Texarkana & Fort Smith Railway. The lease permitted the Kansas City Southern to remove from Texas the general offices, etc., of the Texarkana & Fort Smith, in derogation of a state statute confining to Texas corporations the right to operate railroads in that State and requiring such corporations to maintain their general offices in the State and not to move them except with the approval of the State Commission.

The Commission found that $81,000 would be saved annually by the proposed removal. The question before this Court, as stated by it (p. 528, 529) was not the power of Congress to delegate the authority to the Commission, but whether or not the power had already been given. This Court sustained the order, and dealing with policy of the

Act as amended, cited the cases to which we have referred and said (p. 530):

> "It is the primary aim of that policy to secure the avoidance of waste. That avoidance, as well as the maintenance of service, is viewed as a direct concern of the public."

Dealing with the power of the Commission, this Court said (p. 531):

> "The criterion to be applied by the Commission in the exercise of its authority to approve such transactions—a criterion reaffirmed by the amendments of Emergency Railroad Transportation Act, 1933—is that of the controlling public interest. * * * It is in the light of this criterion that we must consider the scope of the Commission's authority in relation to provisions which are intended to relieve intertsate carriers from burdensome outlays."

In *Transit Commission* v. *United States,* 289 U. S. 121, the Commission had made an order under paragraph (18) of Section 1 of the Act with respect to the continued use by the Long Island Railroad of the tracks and other terminal facilities of the Pennsylvania Tunnel & Terminal Railroad Company. The State authorities maintained that the subject matter of the order was not within the jurisdiction of the Commission, but was reserved to the State. As stated by this Court at pages 125 and 126 of its opinion, the Commission had held "that the reasonableness of a joint facility rental is a matter of public interest as well as one affecting the operations of the carriers." Speaking of the general purpose and effect of the Act as amended, this Court said at page 128:

> "So far as concerns the purpose to be attained by this legislation, there is no room for a distinction between unjustifiable expenditures for the construction or operation of new mileage on the one hand and inadequate rentals or extortionate exactions under trackage agreements on the other. The reasons for the exertion of

federal authority, to the exclusion of state regulation, apply with like force to both. The Act, including paragraph (18) and related provisions, is construed to make federal authority effective to the full extent that it has been exerted and with a view of eliminating the evils that Congress intended to abate. *Railroad Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 585, 589, 590; *New England Divisions Case* (*Akron, C. & Y. R. Co.* v. *United States*), 261 U. S. 184, 189; *Railroad Commission* v. *Southern P. Co.*, 264 U. S. 331, 343; *Texas & P. R. Co.* v. *Gulf, C. & S. F. R. Co.*, 270 U. S. 266, 277; *Colorado* v. *United States*, 271 U. S. 153, 163; *Alabama & V. R. Co.* v. *Jackson & E. R. Co.*, 271 U. S. 244, 249."

The broad authority vested in the Commission to prevent unjust discrimination against interstate commerce was emphasized in *Florida* v. *United States*, 292 U. S. 1, where it is said at page 12:

> "The authority conferred upon the Commission by Sec. 13 (4) of the Interstate Commerce Act, with respect to intrastate rates, is not different in its quality or effect from that given to the Commission to prevent other sorts of unjust discrimination against interstate commerce. That authority rests upon the constitutional power of the Congress, extending to interstate carriers as instruments of interstate commerce, to require that these agencies shall not be used in such manner as to cripple, retard or destroy that commerce and to provide for the execution of that power through a subordinate body. Shreveport Case, 234 U. S. 342, 351, 354, 355; Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co., supra. The purpose for which the Commission was created was to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case, there is an unjust discrimination against interstate commerce."

This Court has held that the power of the Commission over the general operations of carriers is so broad that it may exist and be exercised even in the absence of a specific provision of the act authorizing such action. Thus, in

Alabama & Vicksburg Railway Company v. *Jackson & Eastern Railway Company*, 271 U. S. 244, there was involved the jurisdiction of the Commission over the proposed construction of a connecting track between the railroads parties to the litigation. In sustaining the jurisdiction of the Commission, this Court said at page 248:

> "Prominent among the enlarged powers of the Federal Commission is the control conferred over construction and equipment of railroads, over their use by other carriers and, generally, over the relation of carriers to one another. While none of the amendments in specific terms confer upon the Commission exclusive power over physical connections between railroads engaged in interstate commerce, it is clear that the comprehensive powers conferred extend to junctions between main lines like those here in question."

And in *Transit Commission* v. *United States*, 289 U. S. 121, the railroads contended that the jurisdiction claimed for the Commission was conferred by paragraphs (18) to (20) of Section 1 of the Interstate Commerce Act. This was denied by the Transit Commission. This Court said at page 127:

> "These provisions do not specifically mention trackage agreements providing for joint use of railroad lines, tracks or other facilities by two or more carriers. The question is whether the general langauge of paragraph (18) includes the arrangement under consideration."

Considering then the general purpose of the Act, this Court sustained the jurisdiction of the Commission.

The specific power which petitioners asked the Commission to exercise has been indicated in some cases. In *Cincinnati, etc., Ry. Co.* v. *Indianapolis Union Ry. Co.*, 36 Fed. (2d) 323, the action was to rescind an election to adopt a contract for the use of the terminal facilities of the defendant company. In sustaining the proposed rescission, the court said (p. 325):

> "The proof is undisputed that the continuance of the present burden will be ruinous and will compel a receivership and a foreclosure of existing mortgages. It is now against the established public policy to permit a railroad to assume burdens which it cannot carry and which must cause at least interruptions and embarrassment to its public duties. * * * It is even within the bounds of possibility that the Commission might prohibit its further performance of the obligation upon its existing terms. See *L. & N. Ry.* v. *Mottley*, 219 U. S. 467; *Cleveland Passenger Terminal Case*, 70 I. C. C. 659."

As we have pointed out, Mr. Justice Hitz dissented from the view of the majority of the Court of Appeals with respect to the Commission's power, and expressed the belief that the Commission had the jurisdiction claimed for it. And to us, it is not even clear that the majority of the Court of Appeals felt that the Commission did not have the power claimed for it. In the opinion of the court it is said (R. 208):

> "Congress has conferred on the Commission broad powers for the purpose of avoiding discriminations, preferences and inequalities, and has likewise given it power to regulate the interchange of traffic and the distribution of cars, to revise extortionate exactions under trackage agreements, to enforce the use by one carrier of the terminal facilities of another, and indeed, to take all necessary steps to maintain an adequate railway service, but it is going too far to say that all or any of these powers of themselves justify the abrogation or annulment of a valid contract between carriers in the use of terminal facilities because in its subsequent carrying out inequalities are shown to exist."

All petitioners have ever claimed is that the Commission has power to revise the payments petitioners are required to make under the trackage agreement relating to the use of the Terminal Company's facilities, they claiming that those payments are excessive and extortionate. The Court

of Appeals first recognizes that the Commission has this power and then denies it because of the existence of the operating agreement. As we shall show, the existence of that agreement does not deprive the Commission of any power conferred by law.

From the foregoing, it would seem to be plain that the Commission not only has the claimed power under paragraphs (1), (3) and (4) of Section 3 of the Act, but under other sections as well. Petitioners asked it to exercise no more jurisdiction than it exercised in the *Pennsylvania Company Case,* 236 U. S. 351, the *Louisville & Nashville Ry. Co. Case,* 238 U. S. 1, and the *Chicago, Indianapolis & Louisville Ry. Co. Case,* 270 U. S. 287. True, those cases involved questions of service, but it needs no argument to demonstrate that there may be a discrimination between carriers with respect to charges as well as with respect to service. And since the power of the Commission to deal with discrimination and prejudice is not affected by the form which it may assume, the Commission must have the jurisdiction we claim for it.

The report of the Commission indicates the seriousness of this case to petitioners and the other small users of the Terminal Company's facilities (R. 90). If the Commission does not have the power to deal with the situation presented, its jurisdiction must be much narrower than the limits fixed in the *Colorado Case,* 271 U. S. 153, the *Transit Commission Case,* 289 U. S. 121, the *Texas Case,* 292 U. S. 522, and other cases of similar import.

4. THE CHARACTER OF RELIEF SOUGHT BY PETITIONERS BEFORE THE COMMISSION CONFIRMS THE JURISDICTION AND POWER OF THE COMMISSION TO GRANT SUCH RELIEF.

As we have said, the intervening petitions of petitioners filed with the Commission charged in substance, that the division of the taxes and interest charges of the Terminal Company among its proprietary lines on a numerical basis

instead of on a user basis or on some basis reflecting the amount of use, violated the law. The result of the present method of distributing those charges is indicated by the statement attached to the petition filed in the trial court as Exhibit 2 (R. 60).

From this statement it will be observed that in 1932 every proprietary line of the Terminal Company paid precisely the same amount on account of the taxes and interest charges of the Terminal Company, the payment made by each line constituting one-twelfth or 8⅓ per cent of the total. Petitioner Chicago Great Western Railroad Company thus paid 8⅓ per cent of those charges, although its percentage of use of the Terminal Company's facilities was only 2.61 per cent. Petitioner Kansas City Southern Railway Railway Company paid the same 8⅓ per cent of those charges, although its percentage of use of the Terminal Company's facilities was only 2.24 per cent. Had the taxes and interest charges of the Terminal Company in that year had been divided on the user basis, after crediting income to each user, petitioner Chaicago Great Western Railroad Company would have paid $130,779.39 less than it did pay, and petitioner Kansas City Southern Railway would have paid $139,269.32 less than it did pay. On the other hand, respondent Atchison, Topeka & Santa Fe Railway Company, for example, paid 8⅓ per cent of the taxes and interest charges of the Terminal Company, but its percentage use of that Company's facilities was 26.05 per cent. The division of the taxes and interest charges upon a user basis, after crediting income, would have increased its expenses by $404,351.76. Stated in another way, petitioners paid $130,779.39 and $139,269.32 for something they did not receive, whereas the Atchison, Topeka & Santa Fe Railway received $404,351.76 worth of service for which it paid nothing.

The situation thus shown to exist in 1932 is typical. The report of the Commission shows (Rec. 88) that had all expenses of the Terminal Company, between March 1, 1920,

and December 31, 1923, been distributed on the user basis, instead of on the user basis as to maintenance and operating expense and on the numerical basis as to taxes and interest charges, petitioner Chicago Great Western Railroad Company would have avoided the payment of $540,258.32 and petitioner Kansas City Southern Railway Company would have avoided the payment of $495,908.06. For these payments so made, petitioners received nothing in service or otherwise.

This situation appealed to the Commission and to the Court of Appeals. The Commission was impressed to the extent of recommending (R. 97) a reexamination by participating carriers of terminal arrangements which had been developed in past years, including the division of capital charges and the adjustment of property interests, saying that the subject was obviously of such public importance that a reappraisal should be voluntarily undertaken. The Court of Appeals was similarly impressed, for it said, referring to the statement made by the Commission (R. 207):

> "This suggestion of the Commission that the roads voluntarily amend the contract was obviously the result of the conclusion, inevitable in the circumstances, that the smaller railroads had made an unwise and oppressive agreement which in the light of subsequent events seriously impaired their ability to operate their properties on a satisfactory basis, and there can be no reasonable doubt either of the fact or the result."

Referring to the figures which we have quoted above, the Court continued (R. 207):

> "No further illustrations are needed to show that the contract according to its terms imposes on the smaller lines payments altogether in excess of benefits received, and we have no reason to doubt that if the contract were now in the making the user basis as applied both to fixed charges and operating expenses

would be considered the only fair and reasonable method to adopt."

That this is so can be scarcely open to argument. Relatively speaking, petitioners operate small properties in comparison with such properties as those of respondents Atchison, Topeka & Santa Fe Railway Company, Chicago, Rock Island & Pacific Railway Company, Chicago, Burlington & Quincy Railroad Company and Missouri Pacific Railroad Company. Their ability to sustain fixed terminal charges of the character here involved is necessarily limited, when compared to the ability of larger and richer roads to sustain similar burdens. And the obligations imposed upon petitioners by the operating agreement are permanent for all practical purposes. The operating and stock trust agreements with the Terminal Company run for a period of 200 years from June 12, 1909, and thus have a future life of approximately 175 years.

The mere statement of the excess payments required from petitioners by the operating agreement, payments for which they receive no return, demonstrates that they are "incurring expenses which will lessen their ability to perform well their interstate functions." *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331, 347. Their expenditures necessarily made in the local interest of Kansas City traffic are so large as to constitute a serious burden upon all their interstate traffic. *Colorado* v. *United States*, 271 U. S. 153, 163. The excess of payments made by them on account of the taxes and interest charges of the Terminal Company can only be described as a waste of their revenue, the avoidance of which is a direct concern of the public. *Texas* v. *United States*, 292 U. S. 522, 530, 531.

Under these circumstances it is impossible to reconcile the statement of the Court of Appeals (R. 207) that the operating agreement seriously impairs the ability of the smaller railroads, including petitioners, "to operate their properties on a satisfactory basis," with the conclusion

that the Commission does not have jurisdiction to correct the situation. Certainly, if the facilities of the Terminal Company were now being constructed, the prior approval of the Commission would be necessary. That approval would also be required before the Terminal Company could issue its bonds and other securities, and before petitioners and the other proprietary lines could assume any obligations with respect to those bonds and begin the physical use of the facilities.

The theory apparently adopted by the Court of Appeals leads to the conclusion that the power of the Commission cannot be exercised in the case at bar merely because the facilities are already constructed and in use and the securities have already been issued under a contract which is still in effect. There is no valid justification for such a limitation upon the Commission's power. As we hereafter show, the operating agreement cannot be given such effect, and this being so, the power and jurisdiction claimed for the Commission must be held to exist under the present law and the decisions of this Court with respect thereto.

5. THE EXISTENCE OF A CONTRACT TO WHICH PETITIONERS WERE PARTIES AND WHICH PRESCRIBED THE COMPENSATION TO BE PAID BY EACH PARTY FOR ITS USE OF THE FACILITIES OF THE TERMINAL COMPANY DID NOT DEPRIVE THE COMMISSION OF JURISDICTION TO PASS UPON VIOLATIONS OF LAW RESULTING FROM THE APPLICATION OF THE CONTRACT.

It has been consistently argued throughout this litigation that the existence of the operating agreement between the twelve railroads which own all of the stock of the Terminal Company deprived the Commission of jurisdiction to enter any order of the sort requested by petitioners. The contention made before the Commission, as stated by that body (R. 75, 93), was that, the contract being valid, the Commission had no authority to enter an order which would operate as a revision of it. On this point the Commission indicated

that the existence of the contract would not deprive it of jurisdiction, if jurisdiction had been vested in it by the Interstate Commerce Act, saying (R. 94):

> "The underlying principle considered, no such contract can be placed beyond the reach of a competent exercise of such authority merely by the inclusion therein or the relation thereto of outside interests not themselves subject to the act, however cautiously the power should be exercised in such cases. Nor does the fact that the franchise grants are among the mutual covenants make it immune. * * *"

Certainly, no principle of law is better settled than that the existence of such a contract does not make the subject matter of the contract immune from Federal regulation. In *L. & N. R. Co.* v. *Mottley*, 219 U. S. 467, the issuance of a pass in consideration of the release of a claim for damages was held to be unlawful under provisions of the subsequently enacted Act to Regulate Commerce, this Court holding that the agreement under which the pass was issued must have been made subject to the possibility of such regulation by Congress as would make the agreement unenforcible or impair its value.

To the same effect are *Calhoun* v. *Massie*, 253 U. S. 170; *Interstate Commerce Commission* v. *A. T. & S. F. Ry. Co.*, 234 U. S. 294; and *State of New York* v. *United States*, 247 U. S. 591. In the latter case a passenger rate of 2 cents a mile charged by the New York Central Railway Company was sought to be upheld on the ground that an increase required by the Commission invalidated a charter contract between the State of New York and the Railway Company, but this defense was overruled. Later cases to the same effect are *Stephenson* v. *Binford*, 287 U. S. 251; *Colorado* v. *United States*, 271 U. S. 153, 165; *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266; *Transit Commission* v. *United States*, 289 U. S. 121, 127; *Nebbia* v. *United States*, 291 U. S. 502; and *Texas* v. *United States*, 292 U. S. 522, 531. In the *Federal*

Radio Commission Case, the rule is stated by this Court at page 282:

> "This Court has had frequent occasion to observe that the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy, as such a restriction would place the regulation in the hands of private individuals and withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their enterprises. *Union Bridge Co.* v. *United States,* 204 U. S. 364, 400, 401; *Philadelphia Company* v. *Stimson,* 223 U. S. 605, 634, 638; *Philadelphia, Baltimore & Washington R. R. Co.* v. *Schubert,* 224 U. S. 603, 613, 614; *Greenleaf Lumber Co.* v. *Garrison,* 237 U. S. 251, 260; *Continental Insurance Co.* v. *United States,* 259 U. S. 156, 171; *Sproles* v. *Binford,* 286 U. S. 374, 390, 391; *Stephenson* v. *Binford,* 287 U. S. 251, 276; *City of New York* v. *Federal Radio Commission,* 36 F. (2d) 115, 281 U. S. 729; *American Bond & Mortgage Co.* v. *United States,* 52 F. (2d) 318, 285 U. S. 538; *Trinity Methodist Church, South* v. *Federal Radio Commission,* 62 F. (2d) 850, 288 U. S. ———."

Under these decisions, it scarcely can be argued that if jurisdiction to prescribe the terms upon which the property of the Terminal Company may be used has been conferred upon the Commission by the Interstate Commerce Act and acts amendatory thereof, that jurisdiction is defeated by the physical existence of the operating agreement. Nor are petitioners estopped by reason of their participation in that agreement. *Los Angeles Switching Case,* 234 U. S. 294, 312. The opinion of the Commission indicates the feeling that what petitioners desired it to do was rewrite the contract. Thus, the Commission said (R. 96):

> "Neither expressly nor by implication does the provision embrace a direct or indirect revision or reformation of any such contract, lawful in itself as far as appears, as that here in question; * * *"

Again, in stating the contentions of petitioners and the other small users of the Terminal Company's facilities, the Commission said (R. 95):

> "A contention by the Alton that it would not in terms require a revision of the agreement, but merely a revision of the charges now imposed upon that line, would seem to express a distinction without a difference. Manifestly, the charges could be revised only by a virtual revision, through a superseding order, of those provisions of the agreement in accordance with which the charges are imposed."

The Court of Appeals apparently had the same view, for it indicated (R. 208) that it thought what petitioners had requested was "the abrogation or annulment of a valid contract." This view of the Commission and of the lower court is a mistaken one. We might concede a lack of power in the Commission to rewrite the operating agreement and compel subscription to such a rewritten agreement by the railroads owning the terminal property. Our point is that the power conferred upon the Commission to prevent or cure prejudice and discrimination may not be confined or limited by the language of the operating agreement. The exact contention of petitioners was well stated by Commissioner Eastman in his dissenting opinion in which he said (R. 112):

> "The opinion of the majority conveys the thought that the intervening small users are trying to persuade us to revise or rewrite the contract for the use of the terminal facilities. I do not so understand their position. Their contention is that no contract can stand in the way of the exercise in the public interest of our powers under the act; and this doctrine is, indeed, admitted and amply supported by citations in the majority opinion. When we exercise such powers in conflict with the provisions of a contract, we do not undertake to revise or reform that contract. We merely direct that certain things be done. If they can be done under the contract, well and good. If they cannot be done under the contract, it must be disregarded. • • •

> Our power in this respect is wholly different from that of a court of equity which undertakes to reform a contract for the benefit of one of the parties to it. We do not seek to enforce the principles of equity but only to administer certain legislative provisions for the protection of the public interest, against which provisions a contract is no bar."

We submit that it may not be doubted that the existence of the operating agreement, requiring certain payments by petitioners as a condition of their use of the Terminal Company's facilities, is not a bar to an order by the Commission, made upon a proper record, and prescribing a different basis of payment as a condition of the same use.

6. NOR DOES THE STATUS OF PETITIONERS AS STOCKHOLDERS OF THE TERMINAL COMPANY LIMIT THE POWER AND JURISDICTION OF THE COMMISSION OR REQUIRE ANY CERTAIN DISPOSITION OF THE CASE.

It must be kept in mind that all amounts paid by each petitioner to the Terminal Company, including payments for interest and taxes, represented a cost to it of its use of the facilities of the Terminal Company. The Commission did not recognize this fact, for it is said in the majority opinion with reference to the interest and tax charges of the Terminal Company (R. 96):

> "Those charges are distinctly capital charges, based upon the terminal property itself, not upon its use, in no sense assumed by or chargeable to the proprietary lines as compensation for uses they either do or may make, * * *"

This is wrong and, as pointed out by Commissioner Eastman in his dissent (R. 116):

> "It confuses the status of the railway companies as stockholders of the Terminal Company with their status as users of its terminal facilities."

The view of the majority of the Commission on this point assumes that ownership of stock in a railroad company carries with it the obligation to pay some portion of the expense incurred in operating the company. Certainly, there is no such obligation. Such expenses, including taxes and interest, are an obligation of the corporation, not the stockholders thereof, and are paid out of the revenues of the corporation. In railroad cases, taxes have been held to be operating expenses of the company against which they are assessed, *Duluth Street Railway Company* v. *Commission*, 4 Fed. (2d) 550; *Georgia Power Company* v. *Commission*, 262 U. S. 625; *Galveston Electric Company* v. *Galveston*, 258 U. S. 388, and from the standpoint of petitioners, the interest charges of the Terminal Company fall in the same category.

In this case, the conclusion that all amounts paid by any user of the facilities of the Terminal Company constitute the total payment made for such use is strengthened by the fact that no company owning stock in the Terminal Company gets any benefit from such ownership, except its right to use the facilities of the terminal. The Terminal Company was not organized for profit and does not earn a profit. The sole purpose of its creation was the construction and/or acquisition of terminal facilities so that its proprietary companies having lines of railroad to Kansas City would have adequate terminal facilities at that point.

The operating agreement confirms this view (R. 16, *et seq.*), for in consideration "of the sums to be paid by" the lines using the facilities of the Terminal Company, that Company agrees to supply those facilities and permit their use by the using lines. And included in the sums so to be paid are the amounts to be paid on account of the taxes and interest charges of the Terminal Company (R. 20). Thus, it appears from the operating agreement itself that the taxes and interest charges of the Terminal Company paid by petitioners are paid as part compensation for their use of the Terminal Company's facilities, and not because of petitioners' status as stockholders of the Terminal Company.

This situation is similar to that in *Chicago, etc., Ry. Co.* v. *Des Moines, etc., Company,* 254 Fed. 924, 254 U. S. 196. In that case also, several railroad companies had caused the incorporation of a railroad company to operate terminals in Des Moines, Iowa. On the point we are now discussing, Judge Hook dissented from the majority opinion in the Court of Appeals, saying at page 954 that since the railroad companies had organized the Terminal Company and invested it with the legal title to their property so that their public duties could be better and more conveniently performed, it determined the character of the terminal organization. He also pointed out, at page 955, that the stock was not intended as a source of profit apart from railroad use, the stock ownership and terminal use being inseparable. This Court adopted the view set forth in Judge Hook's dissenting opinion, saying at page 210:

> "In the hands of the proprietors of the connecting lines the stock was the evidence of their right to participate in the benefits of the trust, in the control and management of the terminal company, and in the use of the terminal; but such use, in the nature of things, must be proportioned, not according to the magnitude of their respective stockholdings, but according to their respective traffic requirements. And since the terms of the trust required that these connecting lines should have the entire beneficial use of the property upon paying the cost of the terminal service, there was no room for a profit from the operations of the terminal company out of which dividends could be paid. Except in the theoretically possible but extremely improbable event of an abandonment of the terminal (as to the effect of which no opinion need be expressed), it is plain that, as between the parties to the trust and others having notice of it, the stock could have little or no exchange value except to a company owning or operating a railroad line connecting or capable of connecting with the terminal."

That all amounts paid by the users of the facilities of the Terminal Company are paid only as compensation for that

use is so obvious as to make argument difficult. The fact is that the railroad companies which formerly owned the terminal facilities at Kansas City might well have continued to operate those facilities themselves, as they formerly did, or for the benefit of all railroads under operating agreements without the formation of a separate corporation. In either such case it could scarcely be denied that all expenditures made by each using company for the privilege of using all such terminal facilities would have represented a cost to each such company arising out of such use.

Or, on the other hand, the proprietary companies might have created the Terminal Company as a separate corporation but reimbursed it for all expenses through the medium of payments made under tariffs instead of under contract. In such case it could hardly be contended that that proportion of the tariff charges paid by the users and which was devoted by the Terminal Company to the payment of interest and taxes did not represent a cost of terminal facilities incurred by the using and paying lines.

We submit it must be held that any amounts paid by petitioners on account of the taxes and interest charges of the Terminal Company were paid by them as compensation for their use of the facilities of the Terminal Company and not because of any obligation resulting only from their ownership of stock of the Terminal Company. It follows that the ownership of such stock by petitioners cannot affect the power of the Commission to deal with such charges.

7. THE EXERCISE OF JURISDICTION BY THE COMMISSION WILL NOT ADVERSELY AFFECT ANY PUBLIC INTEREST.

In its decision (R. 91) the Commission referred to the argument presented to it that the operating agreement had been assigned as part of the security for the bonds of the Terminal Company and that the security of these bonds would be jeopardized or destroyed if there were any readjustment of the compensation paid by the proprietary lines to the Terminal Company. We wish to make it plain

that there would be no such result if the Commission prescribed such a change in compensation as petitioners asked. As appears from the Commission's report (R. 86) and the operating agreement (R. 21) every proprietary line of the Terminal Company has a joint and several obligation with respect to the bonds issued by that Company.

It can make no difference to the holder of a bond of the Terminal Company where that Company secures the money with which to pay him. The operating agreement provides that if default in payment is made by any using line, the other using lines must make good the deficit. Thus, if default were made by every using line except petitioners, they would have to pay all obligations of the Terminal Company so long as they were able, either on a user or numerical or some other basis. A bondholder is only concerned in receiving his money, and can have no interest in the source from which his debtor secures the money with which to pay him.

Petitioners have never claimed that any order should be made by the Commission which would affect the right of a holder of the Terminal Company's securities to receive his money. All they have asked is that the basis of contribution by companies using the facilities of the Terminal Company should reflect the volume of such use, and the power of the Commission to require that this be done cannot be affected by the obligations of the Terminal Company to the holders of its bonds.

IV.

Petitioners have not been guilty of laches in this case.

A defense urged in the lower courts was that the delay of petitioners in starting this action constituted such laches as to justify the denial of the writ. The claimed laches, however, was not a ground upon which the decisions of the lower courts were based. There are two sufficient reasons why laches should not prevail as a defense to this

action. The first is that in no answer filed by any respondent is the defense of laches raised. In some jurisdictions it may not be necessary to raise this defense in an answer, (see *Moore* v. *Nickey,* 133 Fed. 289, 293; *Sullivan* v. *Portland,* 94 U. S. 806, 811), but in the District of Columbia the practice and pleading is largely prescribed by a code, which in Section 213, Title 24, under Part II, Mandamus, provides:

> "The defendant, by the day named in such order, unless for cause shown the court shall extend the time, shall file an answer to such petition, fully setting forth all the defenses upon which he intends to rely in resisting such application, which shall be verified by his affidavit."

Laches is essentially a defense and it would seem to follow that since it was not set up as such in any answer filed herein, it may not now be urged as justifying the decision of the lower court.

A further complete answer to the claim of laches appears upon the face of the facts. It is true that considerable periods of time elapsed between the steps taken in the proceedings before the Commission and in court. The report of the Commission was made on November 10, 1925, and from that time until the spring of 1931, nothing was done in the case before the Commission by any party. Petitioners' petitions for rehearing were filed with the Commission in April and May, 1931, and were denied on June 1, 1931. The petition in this case was filed May 31, 1933. Laches cannot be claimed in this Court because of petitioners' delay in filing petitions for rehearing with the Commission, so that the claim must be based upon the lapse of two years between the denial by the Commission of petitioners' petitions for rehearing and the starting of this action.

The controlling circumstance is that during this period there was no change whatever in the conditions under which the property of the Terminal Company was used by petitioners and the railroad respondents. As is stated in the record (R. 195), the same basis of payment prevails now as in 1925. It follows that no respondent has been prejudiced by petitioners' failure to start this suit at an earlier date, and this being so, the doctrine of laches has no application. If any such damage has resulted, it has been imposed upon petitioners and the other smaller users of the Terminal Company's facilities.

It is well settled that the mere passage of time does not constitute laches. *Bunch* v. *United States,* 252 Fed. 673, 677, 678; *Spiller* v. *St. L. & S. F. R. Co.,* 14 Fed. (2d) 284, 288, affirmed 274 U. S. 304; *Kansas City Southern R. Co.* v. *May,* 2 Fed. (2d) 688, 689; *Southern Pacific Company* v. *Bogert,* 250 U. S. 483, 448-490. There is no statute of limitations applicable to the action which petitioners seek to compel and, this being true, laches has no function. *Bunch* v. *United States, supra; Williamson* v. *Monroe,* 101 Fed. 322; *Broatch* v. *Boysen,* 175 Fed. 702, 707; *Brun* v. *Mann,* 151 Fed. 145, 154.

Moreover, petitioners now have and in the past have had a continuing right to a decision by the Commission upon the merits of the issues presented to it, and under these circumstances it has been held that the doctrine of laches does not apply. *Amy* v. *City of Galena,* 7 Fed. 163, 166; *United States* v. *Board of Auditors,* etc., 28 Fed. 407, 409; *Bedgisoff* v. *Cushman,* 12 Fed. (2d) 667, 668. In cases where lapse of time has not prejudiced any party to the litigation, the claim of laches has been uniformly unsuccessful. *Chapman* v. *Douglas,* 107 U. S. 348; *Chiswell* v. *Johnston,* 299 Fed. 681, 689; *Spiller* v. *St. L. & S. F. R. Co.,* 14 Fed. (2d) 284, 288; *Kansas City Southern R. Co.* v. *May,* 2 Fed. (2d) 688-689.

A decision of this Court affirming the order of the lower court on the ground of laches would preclude a determina-

tion by this Court of the Commission's jurisdiction, and since it may at least be claimed that the Commission has the jurisdiction claimed for it, such a decision might well deny to petitioners that justice to which they are entitled. The doctrine of laches should never be applied when its application operates to defeat justice. Thus, in *Bunch* v. *United States,* 252 Fed. 673, 677, the Court said:

> "The doctrine of laches is an equitable principle, which is applied to promote, but never to defeat, justice."

On this point see also: *Williamson* v. *Monroe,* 101 Fed. 322, 330; *Spiller* v. *St. L. & S. F. R. Co.,* 14 Fed. (2d) 284, affirmed 274 U. S. 304; *Kansas City Southern R. Co.* v. *May,* 2 Fed. (2d) 688, 698; *Brun* v. *Mann,* 151 Fed. 145.

Petitioners have never acquiesced in the wrong which they claim was inflicted upon them. From November 10, 1925, when the Commission's report was issued, until March, 1931, no action was taken by any party to the case instituted by the Missouri-Kansas-Texas Railroad, nor did the Commission set the case down for hearing. In May, 1931, petitioners filed their petitions for rehearing, reasserting their claimed rights and refuting any claim of acquiescence by them in what the Commission had done. *Southern Pacific Company* v. *Bogert,* 250 U. S. 483.

Thus, every consideration points to the conclusion that the claim of laches now presented to this Court should be overruled, not only because it is a defense not available to respondents under the pleadings, but also because the facts do not justify its application. If it is sustained, petitioners may perhaps be denied legal rights, the present recognition of which will impose no burdens upon respondents which would not have been imposed upon them had such rights been recognized as long ago as 1925.

All cases in which the claim of laches was sustained are distinguishable upon the facts. Thus, in *Arant* v. *Lane,* 249 U. S. 267, the allowance of the writ might have required

the double payment of salaries, thus imposing an unrecoverable loss upon the Government. *In the Matter of Eastern Cherokees,* 220 U. S. 83, the fund with respect to which the writ was sought had been almost entirely distributed and the allowance of the writ might have caused the Government to make double payments.

In *Ex parte American Steel Barrel Company,* 230 U. S. 35, the petitioners delayed their petition from April, 1912, until February, 1913, during which time the judge whose jurisdiction was attacked had exercised continuous jurisdiction, making many orders and rulings in respect of which it was claimed the lack of jurisdiction existed. In *United States* v. *Blair,* 293 Fed. 846, the allowance of the writ would have created what the Court described (p. 848) as "endless and needless confusion" and the real purpose of the tax laws would have been measurably defeated.

Nor has the delay prejudiced the Commission. It is true that since this case was decided in the lower court the Commission has made an order in the proceedings before it. It is equally true, however, that any further hearings before the Commission which might have been necessary on the issues now raised by petitioners would have been largely on issues of law, and would have been necessary no matter when petitioners' right to such hearings might be established. This results from the fact that the relief requested by petitioners is based upon somewhat different legal principles than those upon which the Missouri-Kansas-Texas based its claims.

We submit that the decision in *Thorpe, et al.,* v. *William Filene's Sons Co.,* 40 Fed. (2d) 269, states the rule to be applied in this case. The case at bar is an action at law, and in the case cited, it is held that the doctrine of laches has no application to actions at law since it is only a defense to the extent that it creates an estoppel. Continuing, the Court said at page 269:

> "The basis of estoppel is deceptive or misleading conduct by the plaintiff on which the defendant has

relied to his injury. Simmons v. Burlington, etc. Rwy. Co., 59 U. S. at page 291, 16 S. Ct. 1, 40 L. Ed. 150; Ward v. Sherman, 192 U. S. 168, at page 177, 24 S. Ct. 227, 48 L. Ed. 391. Mere delay by the plaintiff may constitute such laches as will deprive him of equitable relief, but I am aware of no case in which it has been held to constitute a defense to an action at law, except, of course, under the statute of limitations."

Again, on page 270, the Court said, referring to the actions of the plaintiffs in the suit before it:

"They have, however, on the defendant's own affidavits done nothing active to mislead or deceive it, nothing which would justify saying that their conduct has been so deceptive as to make it inequitable to permit their action to be pressed. They are much like persons who have watched a trespasser go to and fro over their property for many years without making efforts to stop him, and who at last take action. The principle of estoppel has never been extended to such cases. To do so would amount to amending the statute of limitations."

The claim of laches was accordingly overruled, and the same action should be taken in the case at bar.

V.

The case is not moot.

It has also been suggested in the lower courts that since the Commission has made an order in the proceedings before it, which order disposes of the issues raised by the Missouri-Kansas-Texas Railroad Company, this case has become moot. Neither of the lower courts based its decision upon this point.

We submit that the entry of such an order does not make this case moot. The decision of the Commission is not final in the sense that a court judgment becomes final. It is not actually a judgment. It is always subject to rehearing, on petition or on the Commission's own motion, and may al-

ways be set aside and the proceeding reopened. Moreover, the rights asserted by petitioners in their intervening petitions to the Commission were peculiar to them, and they are entitled to an adjudication of those rights regardless of what may have been done with respect to the claim of the Missouri-Kansas-Texas Railroad Company.

The application of the Missouri-Kansas-Texas Railroad Company to acquire the right to use the facilities of the Terminal Company involved a number of questions. One was whether the Missouri-Kansas-Texas Company should use the Terminal Company's facilities except in conformity with the provisions of the operating agreement between the Terminal Company and the companies using its facilities. Another was the question of whether the operating agreement was fair to the Missouri-Kansas-Texas Company. Other questions, raised by the intervention of the small users, were whether the operating agreement was fair to the small users, and whether the Missouri-Kansas-Texas Company could acquire the right to use the Terminal Company's facilities on terms more favorable than were imposed upon the small users. Petitioners and the other small users were directly interested in the answers to each of these questions.

It will be observed that while petitioners were interested in the answers to all the foregoing questions, the Missouri-Kansas-Texas was not directly interested in the decision of any issues except those raised by its application. So far as petitioners were concerned, the issues in which they were interested were raised by their intervening petitions.

The Commission has now decided the issues on the application of the Missouri-Kansas-Texas Company, and it has also held that it had no jurisdiction to grant the relief prayed for by the small users, including petitioners. If it has such jurisdiction, it is its duty under the intervening petitions, and upon its own motion as well, to hear and determine the question as to whether there is a discrimination in favor of the large users and against the small users of

the Terminal Company's facilities. Until this question of jurisdiction has been determined the case is not moot, so far as petitioners' rights are concerned. It has been held in many cases that where an intervening petition in an action at law or in equity is dismissed on the ground that it does not state a cause of action, the intervener may review such judgment on a writ of error. *United States* v. *Northwestern Development Co.*, 203 Fed. 960; *In re Michigan Central R. R. Co.*, 124 Fed. 727; *Illinois Steel Company* v. *Ramsey*, 176 Fed. 853; *Automobile, etc., Corp.* v. *United States*, 39 Fed. (2d) 288.

We do not cite these cases on the theory that this mandamus case is a proceeding to review a decision made by the Commission on the merits. On the contrary, we contend there has been no decision on the merits. The cases are cited for the purpose of showing that where a party has been permitted to intervene in a case, and a decision has been made against him, he has a right to pursue any proper remedy in the proceeding in which he was permitted to intervene. He does not lose that right because there may have been no appeal by the original parties in the proceeding. This is also true in litigation involving orders of the Commission. In *Interstate Commerce Commission* v. *Oregon-Washington R. & N. Co.*, 288 U. S. 14, the right of the Commission, an intervener in the lower court, to a decision on the merits, was upheld although the United States, the statutory defendant, had refused to appeal.

Also, as we have said, it is a legal obligation of the Commission to compel the discontinuance of charges made by a carrier which unlawfully favor some other carriers, and constitute an undue burden on the interstate commerce of still other carriers. There is presented in this case, therefore, a question of public interest. It is the duty of the Commission to investigate such a question, and if it fails to perform its duty on the assumption that it has no jurisdiction, the right of an intervener to such an in-

vestigation and a decision thereon ought not to be denied on the ground that the case has been disposed of on other issues. 4 C. J. 576, Notes 81-82-82, Sec. 2383; *Southern Pacific Terminal Company* v. *Interstate Commerce Commission,* 219 U. S. 498; *Southern Pacific Company* v. *Interstate Commerce Commission,* 219 U. S. 433; *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290.

A decision disposing of this case on any issue other than that of the Commission's jurisdiction would require a repetition of all steps taken in the proceedings up to this time. Such procedure would cause substantial delay, large expense, and would serve no good purpose.

CONCLUSION.

For all of the reasons which we have heretofore given, we submit that the judgment of the Court of Appeals should be reversed. The decision of that Court that the Commission had actually exercised its power and jurisdiction is plainly based upon a complete misunderstanding of the decisions of this Court.

So far as the merits of the case are concerned, we do not see how it can be denied that the Commission has the jurisdiction claimed for it. A denial of that jurisdiction will perpetuate a situation whereby the revenues of petitioners are being constantly wasted and dissipated. Instead of being employed to maintain the properties and equipment of petitioners in such a state of efficiency that they can carry well the burden of handling the traffic of the country, those revenues are being spent to lighten the burdens of other carriers who are enjoying substantial privileges without payment therefor. No clearer case of the existence of undue discrimination against and burden upon the interstate revenues and operations of carriers can be imagined than is presented here.

It is inconceivable that under these circumstances there can be a successful denial of the Commission's power to

correct the situation. A denial of that power in the Commission must necessarily impose substantial limitations upon powers which have heretofore been conceded to reside in the Commission. We submit that the judgment of the Court of Appeals should be reversed with directions to issue the writ of mandamus prayed for.

Respectfully submitted,

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